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No. 08-111

FILED
AUG 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

RONALD MICHAELS AND
DELORES MICHAELS,
Petitioners,

v.

TOWNSHIP OF MACOMB,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MICHIGAN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

Whether this Court has jurisdiction to review the Petitioners' federal question where Petitioners failed to raise the federal question in the court of first instance and where Petitioners' writ fails to comply with Supreme Court Rule 14.1(g)(i).

II

Whether Petitioners were denied due process under the Fifth Amendment and Fourteenth Amendment due process clauses by a state court order holding Petitioners in contempt for not complying with a consent judgment, imposing fines and incarceration, where: Petitioners admitted the contemptuous behavior; the trial court conducted a site visit to verify Petitioners' contemptuous behavior and where the state court order was designed to compel Petitioners' future compliance with the consent judgment.

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OPINIONS BELOW

The Respondent accepts the Petitioners' statement regarding the opinions below.

JURISDICTION

Petitioners did not raise the federal question in the state court of first instance and therefore the federal question was not timely and properly raised and this Court does not have jurisdiction to review the question on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioners' statement regarding the constitutional provisions at issue in this case.

STATEMENT OF THE CASE

I. INTRODUCTION

For over ten (10) years, the Respondent litigated with Petitioners in state courts over Petitioners' use of their property in the township to conduct an illegal commercial composting operation (leaves, grass, and yard debris). Petitioners attempted to protect their illegal composting business by shielding the same under the Michigan Right to Farm Act ("RTFA"). After a finding by the Michigan Department of Agriculture ("MDA"), that Petitioners were not operating pursuant to the RTFA nor Generally Accepted Agriculture Management Practices ("GAAMP's"); facing environmental violations and enforcement action by the Michigan Department of Environmental Quality ("MDEQ"); three (3) separate appeals to the State Court of Appeals, which resulted in the case being returned to the trial court on January 23, 1998, May 4, 2002, and April 2, 2003; and the State Supreme Court denying Petitioners' application for leave to appeal on December 12, 2003; the Petitioners decided to enter into a settlement agreement. On June 24, 2004, a settlement between the parties was placed on the record in the trial court. Additionally, the parties entered into a written consent judgment entered by the trial court on June 30, 2004.

The consent judgment required the Petitioners' composting site to be closed as of December 31, 2005. All composting materials were to be removed from the site no later than December 31, 2007. To facilitate removal of the material, the consent judgment

provided compost could be removed in bulk from the site and sold commencing with the entry of the consent judgment. Petitioners were allowed to sell the finished compost in order to comply with the provision of the consent judgment that required all composting materials were to be removed from the site no later than December 31, 2007.

On October 27, 2007, the Respondent inquired of Petitioners, through their legal counsel, as to the removal of the compostable materials, compost and restoration of the site. The Respondent did not receive a reply from Petitioners until November 28, 2007 when Petitioners filed a document entitled, satisfaction of consent judgment. Petitioners alleged they complied with the consent judgment.[1] The Respondent filed objections to the satisfaction of consent judgment.

The Petitioners have done little since the entry of the consent judgment to comply with the terms of the judgment requiring the removal of the leaves,

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[1] Petitioners' claimed that finished compost was not included within the definition of compostable materials or composting materials as those terms are used in the consent judgment. Petitioners' interpretation was without merit given the fact that the leaves, grass and yard debris and other compostable materials have not been removed from the site, but instead have been turned into compost and left on the property. In other words, the leaves, grass and yard debris and other compostable materials have changed form but still remain on the property in a different state, i.e., compost. The consent judgment required that all compostable materials must be removed from the site on or before December 31, 2007. The leaves, grass and yard debris and compostable material remain on site, albeit in a different form.

grass and yard debris, compostable materials/compost from the site. As of January 2, 2008, the Petitioners had mountains of compostable material/compost on the site which on information and belief, exceed 250,000 cubic yards of material.

II. PETITIONERS ACKNOWLEDGED THE CONSENT JUDGMENT REQUIRED THE COMPOST BE REMOVED FROM THE SITE BY DECEMBER 31, 2007

On two (2) occasions, Petitioner, Delores Michaels provided sworn deposition testimony wherein she acknowledged that all compost was required to be removed from the macomb township site by December 31, 2007.

A. DEPOSITION TESTIMONY OF MAY 31, 2006

On May 31, 2006, Delores Michaels was sworn and gave deposition testimony in litigation captioned, *Township of Richmond v Rondigo, LLC*, et al, Case No: 06-1054-CZ, in the Macomb County Circuit Court. Ms. Michaels testified, in part, at her deposition as follows:

Q. Now, you testified this morning that, as of today, all the finished compost is at the King of the Wind Farms. (Macomb Township site.)

A. King of the Wind.

Q. Wind - - has been sold?

A. Yes.

Q. To whom?

A. It would be a Canadian agency, I am not sure because its initials A, R, something.

Q. Who made the arrangements to sell it?

A. I did.

Q. And do you have a contract with them, a written document that shows they have purchased all of this?

A. No.

Q. Just oral?

A. Correct . . .

Q. And my understanding is there is a court order in effect that says you must clear that Macomb site no later than December 31, 2007; is that correct?

A. That is correct.

Q. And, sitting here today, do you - - and I realize it is an estimate, but it is you plan to have all of it finished, so it can be shipped by that time?

A. That is correct.

B. DEPOSITION TESTIMONY OF DECEMBER 7, 2006

On December 7, 2006, Delores Michaels gave sworn deposition testimony in litigation captioned, *Rondigo, LLC v Casco Township*, Case No: CV74775 in the Federal District Court of the Eastern District of Michigan. In her deposition, Ms. Michaels testified as follows:

Q. As of December 31, 2006, you recall having approximately 250,000 cubic yards of material on site at King of the Wind?

A. Correct.

Q. Now, you understand the consent judgment requires that that material, 250,000 cubic yards be taken off-site by the end of 2007, correct?

A. Correct.

Q. And is the 250,000 cubic yards that you have estimated on-site as of October 31, 2000, or 2006 is that material all finished product or is it in various stages of being finished?

A. It is finished product but not all of it has been screened yet.

Q. What is your intent as far as what you are going to do with that material?

A. I am going to sell it.

III. THE RESPONDENT'S MOTION TO FIND PETITIONERS IN CONTEMPT

On January 3, 2008, the Respondent filed a motion to hold the Petitioners in contempt of the consent judgment. The motion was filed in the Macomb County Circuit Court (trial court). Petitioners appeared through their attorney and filed an answer to the Respondent's motion. On January 14, 2008, the trial court held a hearing on the motion. Petitioners were represented by their legal counsel. At the motion hearing, the Petitioners did not contest the fact that there was compost on their property in violation of the consent judgment. App. A-8. The Petitioners failed to raise any issues regarding the court's jurisdiction or violation of due process. Petitioners' defense was confined to sematics i.e. how the consent should be interpreted. At the conclusion of the motion hearing, the trial court took the Respondent's request for relief under advisement.

On February 27, 2008, the trial court issued its opinion and order finding Petitioners in contempt of the consent judgment. The trial court imposed monetary sanctions, and possible incarceration of the Petitioners if they did not remove the compost/compostable materials from the site on or before March 27, 2008. The trial court also awarded the Respondent its costs and attorney fees incurred in

bringing the motion. In the opinion and order, the trial court observed "At the hearing on the current motion, Petitioners did not (and, in brief, still do not) deny that they have not removed all composting materials from their farm." Petitioners' APP. A-10.

IV. THE STATE COURT APPELLATE PROCEEDINGS

A. COURT OF APPEALS

Subsequent to the trial court's February 27, 2008 opinion and order, finding Petitioners in contempt of the consent judgment, the Petitioners did nothing to remove the compost/compostable materials from the site.

Petitioners filed an application for leave to appeal to the Michigan Court of Appeals. On March 28, 2008, the Court of Appeals entered an order reversing the trial court's monetary sanction against Petitioners which exceeded the statutory maximum of $7,500.00, and affirming the finding of Petitioners' contempt.

B. MICHIGAN SUPREME COURT

Petitioners then filed an emergency application for leave to appeal to the Michigan Supreme Court. On April 11, 2008, the Supreme Court entered an Order denying Petitioners' application for leave to appeal.

V. RESPONDENT'S MOTION TO INCARCERATE RONALD AND DELORES MICHAELS

After the Michigan Supreme Court's denial of Petitioner's emergency application for leave to appeal; the Petitioners continued in their refusal to comply with the terms of the consent judgment. The Respondent filed a motion with the trial court to incarcerate Ronald and Delores Michaels.

The Petitioners and Respondent appeared for several motion hearings in the trial court and counsel visited the site on two separate occasions. The end result was that the parties disagreed whether the Petitioners had complied with the consent judgment.

In order to resolve the issue, the trial court conducted a site visit with counsel for the parties on June 30, 2008 at approximately 6:30 p.m. Subsequent to the site visit, the trial court issued an Opinion and order finding Petitioners in contempt and ordering that Petitioners report to the Macomb County Jail. App. A-11.

A. FURTHER STATE COURT APPELLATE PROCEEDINGS

On July 21, 2008, the Petitioners filed a motion for stay of proceedings in the trial court which was denied.

Petitioners then filed an application for leave to appeal, a motion for stay, and a motion for immediate

consideration with the Michigan Court of Appeals. On July 21, 2008, the Michigan Court of Appeals issued an order denying the relief sought by Petitioners.

The Michigan Supreme Court on July 30, 2008, denied Petitioners' emergency application for leave to appeal, ex-parte motion for a stay pending appeal, and application for stay of execution of the trial court order dated August 1, 2008.

VI. PETITIONERS ARE RELEASED FROM CUSTODY

On July 31, 2008, the trial court judge and counsel visited Petitioners' property to determine the extent of Petitioners' efforts to clean-up the site and comply with the consent judgment. Subsequent to the site visit, the trial court determined that Petitioners were making a concerted effort to clean-up the site consistent with the consent judgment. On July 31, 2008, the trial court entered an order releasing the Petitioners from custody after approximately six (6) days of incarceration. The trial judge scheduled weekly site visits to insure that Petitioners continue their clean-up efforts in earnest.

VII. REASONS FOR DENYING THE PETITION

A. PETITIONERS' DID NOT RAISE THE FEDERAL QUESTION IN THE STATE COURT OF FIRST INSTANCE AND THEREFORE THE QUESTION HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT

The court of first instance was the Macomb County Circuit Court (trial court). Petitioners' alleged due process violations and claim that the trial court lacked jurisdiction over Petitioners because Respondent failed to comply with state rules applicable to contempt proceedings must have, first, been raised in the trial court. Supreme Court Rule 14.1(g)(i) requires petitioners seeking review of a state court judgment to specify the stage in the proceedings where the federal question sought to be reviewed was raised. Petitioners' application fails to comply with Rule 14.

A review of the trial court January 14, 2008 oral argument on the Respondent's motion to hold Petitioners in contempt confirms that Petitioners did not raise any issues in the trial court relative to jurisdiction or other alleged procedural infirmities. App. A-1. Since Petitioners failed to timely raise the federal question in the court of first instance, this Court does not have jurisdiction to review the question on a writ of certiorari. *Adams v Robertson*, 520 U.S. 83 (1997). In *Adams* this Court granted a petition for certiorari to the Supreme Court of Alabama. However, after briefing it became apparent that the Petitioners failed to establish that they properly presented the

federal question to the Supreme Court of Alabama. The writ was dismissed as improvidently granted.

Petitioners were precluded from raising the federal issue in the Michigan appellate courts for the reason that issues not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *Napier v Jacobs*, 429 Mich. 222, 414 N.W.2d 862 (1987).

B. PETITIONERS DID NOT CONTEST THEIR FAILURE TO COMPLY WITH THE CONSENT JUDGMENT

The trial court in its February 28, 2008 opinion finding Petitioners in contempt specifically observed that the Petitioners did not deny all composting material was not removed from the Petitioners' property as required by the consent judgment. The trial court found:

> At the hearing on the current motion (Respondent Motion for Contempt) Petitioners did not (and, in brief, still do not) deny that they have not removed all composting material from their farm . . . Petitioner App. A-10.

The trial court is not required to conduct an evidentiary hearing where the contemptuous behavior is admitted. The Petitioners raised a legal issue regarding interpretation of the consent judgment as their defense for failure to comply. The Petitioners never called into question the jurisdiction of the trial court.

C. THE TRIAL COURT PERSONALLY OBSERVED PETITIONERS' CONTEMPTUOUS BEHAVIOR

On June 30, 2008 at 6:30 p.m. the trial court visited Petitioners' property with counsel. At that time the court walked over the site and was driven around the property. The court had the opportunity to fully observe the condition of the property and whether there was compliance with the consent judgment.

The trial court, after the site visit, issued a written opinion and order finding that Petitioners continued to violate the consent judgment and ordered the Petitioners to be incarcerated. The Petitioners were ordered to be incarcerated to a jail term of thirty (30) days or until Petitioners removed the remaining compost material from their property. In other words, the Petitioners had the keys to the jail in their hands. Petitioners could either elect to sit in jail for 30 days or arrange to have the compost material removed from their property and be freed from the order of incarceration.

Petitioners were warned by the trial court since February of 2008 that their failure to comply with the consent judgment would ultimately lead to their incarceration. Petitioners have only themselves to blame for their incarceration.

An order of contempt is in the discretion of the trial court and is reviewed for an abuse of discretion. *People v Ahumanda*, 222 Mich App 612, 564 NW2d 188 (1997). The findings of the trial court regarding

contempt must be affirmed if there is competent evidence to establish those findings. *Cross Co. v UAW Local 115 (AFL-CIO)*, 377 Mich. 202, 139 N.W.2d 694 (1966). Here, the Petitioners admitted that not all of the compost was removed from their property. Additionally, the trial court had the opportunity to personally observe Petitioners had not removed all of the compost from their property which failure is a violation of the consent judgment.[2] Additionally, the trial court's rulings were reviewed and affirmed on four (4) occasions by state appellate courts.

The trial court fashioned an order based on Petitioner's contempt designed to compel future compliance with the court order. The penalties imposed by the trial court were coercive and avoidable through obedience. Neither a jury trial nor proof beyond a reasonable doubt was required. The trial court's sanctions were civil in nature and could be imposed in an ordinary civil proceeding upon notice and opportunity to be heard. *International Union, United Mine Workers of America, et al. v Bagwell*, 512 U.S. 821 (1994).

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[2] Rather than remove the compost, Petitioners utilized bulldozers and other heavy machinery to spread the compost over the surface of a portion of Petitioners' property. The parties and trial court observed on June 30, 2008, that plastic materials, tree roots, stumps, branches, piles of leaves in various stages of disintegration, and old license plate, plastic and other debris were mixed in the compost and spread across the property. Instead, Petitioners were required to load the compost and compostable materials into trucks and move the material off their property.

VIII. CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this court deny the petition for Writ of Certiorari filed by Petitioners, Ronald and Delores Michaels.

Respectfully submitted:

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STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF MACOMB

TOWNSHIP OF MACOMB,

Plaintiff,

-vs- **Case No: 95-4372-CZ**

RONALD MICHAELS , et al,

Defendant.

ORAL ARGUMENT

BEFORE THE HONORABLE DIANE M. DRUZINSKI, CIRCUIT COURT JUDGE
Mount Clemens, Michigan - Monday, January 14, 2008

APPEARANCES:

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Witnesses:

Exhibits:

Mount Clemens, Michigan
Monday, January 14, 2008
at about 8:39 a.m.

— — —

THE COURT OFFICER: All rise.

The Circuit Court for Macomb County is now in session. the Honorable Diane M. Druzinski presiding. Please turn off all cell phones and pagers per order of the Court.

You may be seated.

THE COURT: Thank you, Jeff.

THE CLERK: Macomb Township versus Michaels.

MR. DLOSKI: Good morning, Your Honor. Lawrence Dloski appearing on behalf of the Township of Macomb.

MR. DAVIS: Good morning, Your Honor. Robert Davis on behalf of the Defendants.

THE COURT: This is a flash from the past.

MR. DLOSKI: Well, Judge, I didn't expect that we would be here today, but unfortunately we are.

As the Court is well aware, after approximately ten years of litigation the Township and Dolores and Ronald Michaels entered into a Consent Judgment on June 30, 2004 to close this site and take - - get ride of all the materials on the site. they did close the site as they were required to on or before December 31st, 2005.

The Consent Judgment provided for two more years to finish the materials and to be able to get them off site. They haven't done that. As of the date of this motion, as we stand here today, there's

approximately - - no one has really quantified it, but approximately 250,000 cubic yards of finish material. there's mountains of it. And I don't believe that the Defendants are contesting that there's raw - - that there's material on site, compost.

What they have taken, Judge, is a position that the Consent Judgment says we don't have to move the compost off the site. It only referred to moving the leaves, the grass, yard clippings and not compost. That position is totally frivolous. It is asserted in bad faith, Judge. It was clear in the Consent Judgment the Michaels had to operate under the - - still had to operate that site in conformance with the Right to Farm Act. The Right to farm act doesn't allow any compost to be sold by a farmer from their site. But that Consent Judgment contained a paragraph that the Michaels could sell compost, the finish product from the site. And the only reason that was put in was because to facilitate taking that compost off site. The Michaels wanted it there to give them another option to get rid of that compost that was on the property.

And Dolores Michaels understood, Judge, exactly what this Consent Judgment required her to do. On May 31st of 2006 she gave a sworn deposition testimony in the case of Richmond Township v Rondigo, LLC pending in this court before Debra Servitto. In that case she was asked, Now, you've testified this morning that as of today all of the finish compost that is at King of the Wind Farm has been sold? Dolores Michaels answered yes.

She was further asked, question, It is - - and my understanding is there is a court order in effect that says you must clear that Macomb site no later

than December 31, 2007? that's this order. The question goes on, Is that correct? Answer, That's correct.

She also gave sworn deposition testimony on the 7th day of December, 2006 in the lawsuit Rondigo, LLC v Casco Township pending in the Federal District Court for the Eastern District of Michigan. At that time I asked her, As of December 31st, 2006, you recall having approximately 250,000 cubic yards of material on site at Kind of the Wind? What's this site. Correct.

Now, you understand the Consent Judgment requires that the 250,000 cubic yard be taken off site by the end of 2007, correct? Answer, correct.

Now, these are attached as Exhibits 9 and 10 to our motion, Judge. They have taken the position that compostable materials doesn't include compost, which again, as I said, that's - - it is asserted in bad faith.

I have attached as Exhibit 12 to the motion deposition transcript from J. D Lindenberg who is one of the preeminent composting experts in the country. His deposition was taken on December 14th, 2007 in Rondigo v Casco Township, the federal district court case. He clearly testified there that compost is a compostable material. In fact, he recommends that compost be mixed in with raw materials in the composting process to control odors and smells.

So, Judge, I think what happened here is she had the compost sold to this Canadian company that she testified to in the dep. That deal fell through. You can't sell it, this material you just can't sell it like she thought she could sell it. However, that's not

your problem and that's not my problem. They entered into a deal. They breached that deal. And now the penalty is contempt, Judge.

I have attached the statutes. I have attached the provisions from the Revised Judicature Act. We're requesting that you find them in contempt. That they each be fined $7,500 as the statute provides, and that both Dolores and Ronald Michaels be incarcerated in the Macomb County Jail until such time as the compost is removed from the site. The statute specifically provides for that, Judge and we ask that you do that.

THE COURT: Thank you, Counsel.

MR. DAVIS: Your Honor, thank you for hearing us.

Your Honor, we submitted a satisfaction of judgment at the end of December when, in fact, the compliance had been met, i.e., there's an admission already that the site has been shut down and all the compostable and composting material have been removed. There is a separate paragraph in the contract, Paragraph 5, that addresses finished compost. The finished compost may be removed from the site as well.

Everything that he offers is parol evidence. He has taken deposition testimony, which I have given you a case that you cannot use in this hearing. This was a contract between two parties. It is not for Larry, I or the Court to rewrite that contract. The language says compostable materials is defined as grass, leaves and other compostable material. The finished compost is addressed in a separate paragraph.

I don't know what happened back then but

they used different terms and they defined them accordingly. As we site here today the only thing on the site is the finished compost. You have testimony from the DEQ that there has been no odors for three years now. The black dirt finished compost is the only thing at the site. That's contemplated different in the contract. The wording was clear. If the parties had wanted to distinguish those terms and defined them, they would have. The only one they defined was compostable material as being the grass, the leaves, the incoming stuff.

MR. DLOSKI: Judge, the other paragraph also refers to composting materials that that's what has to be off site by December 31st, 2007. They claim compostable material doesn't include compost, which is ridiculous. The whole intent of this was to close this down and get if off site. And to the extent that they say composting - - compostable material doesn't include compost we can use her deposition testimony obviously.

MR. DAVIS: No, we can't.

MR. DLOSKI: That's clear evidence of what's going on here, Judge.

MR. DAIVS: No, we can't, Judge. Look at paragraph 5, it uses a different term. It uses finished compost.

THE COURT: I'm going to take it under advisement. This is a 1995 case that has been from here to the Court of Appeals, back to the Court of Appeals, to the Supreme Court and back again. I thought we had tentatively resolved it for good back when the Consent Judgment was entered into. I was not happy to see this on my docket again, and particularly when it appears it is going to boil down

to a matter of semantics.

I will take it under advisement, and I will issue a written opinion. I expect the party that wins to comply with my ruling.

MR. DAVIS: We will do so, Judge.

THE COURT: Do a yellow order staying I'm going to take it under advisement, please.

MR. DAVIS: Yes.

MR. DLOSKI: Yes, Thank you, Judge.

THE COURT: You're very welcome.

(Proceedings concluded at 9:07 a.m.)

CERTIFICATION

STATE OF MICHIGAN)
) SS

I, Robert L. Smith, Official Court Reporter of the Sixteenth Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Macomb Township versus Michaels, et al, Case Number 95-4372-CA, on January 14, 2008.

_____

Robert L. Smith, CSR 5098
Official Court Reporter

Date: 03-05-08

Mount Clemens, Michigan

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF MACOMB

TOWNSHIP OF MACOMB,

Plaintiff,

-vs- **Case No: 95-4372-CZ**
DIANE M. DRUZINSKI

RONALD MICHAELS and
DELORES MICHAELS,

Defendant.

OPINION AND ORDER RE
PLAINTIFF'S MOTION FOR
INCARCERATION OF DEFENDANTS
FOR FAILURE TO COMPLY
WITH CONSENT JUDGMENT

Plaintiff filed a motion seeking incarceration of defendants for their failure to comply with the June 24, 2004 consent judgment. The pertinent paragraphs of the consent judgment are as follows:

1. The Defendants, RONALD AND DELORES MICHAELS, shall permanently cease received from off-site sources, leaves, grass, yard clippings and other compostible materials at their farm in Macomb Township and the

composting also will be closed, as of December 31, 2005.

2. All composting material shall be removed from the composting operation no later than December 31, 2007.

5. Any finished compost may be removed in bulk from the site and sold commencing with the effective date of this consent judgment.

In an Opinion and Order dated February 27, 2008 this court found Defendants in civil contempt of the June 24, 2004 consent judgment and assessed monetary sanctions and incarceration in 30 days, if the Defendants failed to comply with the terms of the consent judgement.

The Court of Appeals affirmed this decision, although modifying the monetary sanctions. Defendants application to the Supreme court was denied. Defendants have since paid all fines, attorney fees and costs assessed, but according to Plaintiff, still has not removed all compostible/composting material from their farm, and therefore, Defendants should be incarcerated.

In support of their position Plaintiff provided the court with Exhibits 1 through 5 depicting the current condition of the farm. Specifically alleging a berm of compostible/composting material still remains along the east side of the property, parallel with Card Road. Plaintiff also submitted the written results of a Michigan Department of Environmental Quality site

visit which occurred on June 10, 2008.

In response, Defendants contend they have complied with the consent judgment and incarceration is not warranted. Specifically, Defendants have submitted an Affidavit of their counsel, Ms. Geist, and an Affidavit of Renee Michaels, the Defendants' daughter. Ms. Geists' affidavit asserts that the Defendants are in the process of returning the former composting site to a farm field, are mixing horse manure with topsoil, using a front loader to push soil amendments and are screening topsoil to remove paper and plastic from the site. Ms. Michaels affidavit asserts that all composting materials were removed from the former composting site at the end of last year, it was their intention to plant crops on the clay compost pad where the windrows had been placed and in order to do that, the needed to spread a layer of topsoil over the clay pad and work fertilizing nutrients (manure) into the soil. They began this process this year by pushing up material from the other fields and bringing to the site materials and equipment they would need to accomplish their plan. Ms. Michaels affidavit goes on to state they were told by Plaintiff's counsel to continue spreading "piles" of soil to turn the area into a farm, and as such, workers were told to continue to spread the soil, work the manure into the soil so the area would be ready for crops, and that an on-site screener would be screening soil to remove debris, which is what affiant believed Plaintiff counsel wanted them to do.

There was a site visit in April of 2008 and on June 19, 2008. Both parties, being again unable to

agree on whether Defendants had removed all materials consistent with the June 24, 2004 consent judgment and subsequent to the court's order of February 27, 2008 holding Defendants in contempt, but not imposing incarceration, urged and agreed that this court visit and inspect the site.

On Monday, June 30, 2008, this court went to Defendants' facility, with counsel for both sides present. The court was driven all around the property, and walked the area of the former composting site. The court observed a mound/berm along the east side of the property, parallel with Card Road, which has yard compost on it. Further, this court observed yard compost (leaves) in significant decomposing clumps consistently spread throughout the area of the former composting site. There was an odor associated with the yard compost (leaves). Notwithstanding whatever defendant is doing to rid debris from soil allegedly pushed over from other fields, make the area suitable for farming, addition of nutrients to the soil, etc. none of that activity was contained in nor required by the consent judgment.

This court finds that as of June 30, 2008, Defendants have still not complied with the consent judgment as the berm along the eastern portion of the property, parallel with Card road was not removed and should have been removed by December, 2007. Further that Defendants spread some of the composting material from the berm into the soil for their anticipated farming project. Now, almost 120 days subsequent to the initial finding of contempt, Defendants are still in violation of the court order.

Therefore, the court is ordering the incarceration of Defendants to a jail terms of 30 days or until Defendants have removed the remaining composting material from their property - specifically the berm referenced in this opinion as well as composting material spread into the soil. When and if Defendants believe they have fully complied with this court order, they may contact Plaintiff's counsel to confirm such compliance. Both parties are then instructed to submit a stipulation to that effect. Both parties are urged to expeditiously work with each other and contact the court for a post judgment status conference if the parties are still unable to reconcile whether or not Defendants contemptuous behavior has ceased.

For the foregoing reasons, Plaintiff's Motion to Incarcerate Defendants is GRANTED. Both Defendants shall report to the Macomb County Jail on Tuesday, July 22, 2008 at 9:00 a.m. to begin their sentence. In compliance with MCR 2.602(A)(3), the court states this case has been previously closed and remains CLOSED.

IT IS SO ORDERED

/s/ Hon. Diane M. Druzinski, Circuit Court Judge

Dated: July 18, 2008

[stamped as a True Copy, CARMELLA SABAUGH, COUNTY CLERK, by Patricia K. Jones, Court Clerk]